STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLADDIE L. TAYLOR,

Defendant-Appellant.

UNPUBLISHED
June 24, 2003

No. 239516
Wayne Circuit Court
LC No. 01-009145-01

Before: Cavanagh, P.J, and Gage and Zahra, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of assault with intent to rob while unarmed, MCL 750.88, and sentenced, as a fourth habitual offender, MCL 769.12, to five to fifteen years in prison. We affirm.

Defendant, who was a family friend of the victim, arrived at the victim's home late in the evening. After allowing defendant to enter, the victim went to the kitchen to retrieve a phone number for defendant, and when she returned, defendant grabbed her in the chest area. Defendant also attempted to grab the victim's sister, who escaped and ran to the kitchen. After the victim broke free from defendant and ran for the front door, defendant reached the door first and slammed it shut. Defendant then requested money. After the victim's sister emerged from the kitchen and threatened defendant with a large butcher's knife, and a neighbor knocked on the door, defendant ran out of the house and drove off in his car.

Defendant first claims that the prosecution failed to present sufficient evidence to support the conviction of assault with intent to rob. Claims of insufficient evidence following a bench trial are reviewed de novo, viewing the evidence in a light most favorable to the prosecution, to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hunter*, 209 Mich App 280, 282; 530 NW2d 174 (1995). The elements of assault with intent to rob while unarmed are "(1) an assault with force and violence, (2) an intent to rob and steal, and (3) defendant being unarmed." *People v Chandler*, 201 Mich App 611, 614; 506 NW2d 882 (1993), citing *People v Sanford*, 402 Mich 460, 474 n1; 265 NW2d 1 (1978).

Defendant claims that the prosecution failed to prove that defendant intended to commit robbery when he assaulted the victim. Robbery requires the intent to permanently deprive an owner of his property. *People v King*, 210 Mich App 425, 428; 534 NW2d 531 (1995). Intent

may be inferred from the facts and circumstances, and because of the difficulty in proving an actor's state of mind, minimal circumstantial evidence is sufficient. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984). Both direct and circumstantial evidence, and reasonable inferences drawn therefrom, may be sufficient to prove intent. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

Considering the circumstances of the assault, the evidence was sufficient to support a finding that defendant intended to rob the victim. After entering the victim's home, defendant grabbed the victim in such a way that she immediately concluded that defendant was going to rob her. As the victim attempted to escape, defendant slammed the door shut and told her that he needed money. Defendant also begged the victim not to tell defendant's sister and apologized for having to "do this." Defendant did not stop his aggressive behavior until he was threatened with a knife by the victim's sister and confronted with a neighbor at the door. This evidence, viewed in a light most favorable to the prosecution, supports the conclusion that defendant possessed the intent to rob when he committed the assault.

Defendant next claims that the trial court's findings of fact were clearly erroneous. Findings of fact by the trial court may not be set aside unless clearly erroneous. MCR 2.613(C); *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002); *People v Lyons*, 203 Mich App 465, 468; 513 NW2d 170 (1994). The trial court's factual findings are clearly erroneous if, after review of the record, this Court is left with a definite and firm conviction that a mistake has been made. *Lyons*, *supra*.

The trial court made the following factual findings: (1) that defendant assaulted the victim; (2) that defendant intended to take money from the victim; and, (3) that defendant was unarmed. After reviewing the testimony presented at trial, this Court is not left with a definite and firm conviction that a mistake has been made. Regarding the assault, all three witnesses, including defendant, testified that defendant grabbed the victim. Regarding defendant's intent, the victim testified that during the assault she believed that defendant intended to rob her. Furthermore, after apologizing for his acts, defendant refused to allow the victim to leave and told her that he needed money. Finally, regarding defendant being unarmed, although there was some indication that defendant carried a weapon in his fist, the trial court determined that the evidence was insufficient to support a finding that defendant possessed a weapon. In light of this evidence presented at trial, we conclude that the factual findings were not clearly erroneous.

Finally, defendant claims that his attorney failed to provide effective assistance of counsel. To preserve the issue of ineffective assistance of counsel, a defendant must move for a new trial or an evidentiary hearing before the trial court. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Because defendant failed to move for a new trial or request a *Ginther*[1] hearing below, this Court's review of the issue is limited to mistakes apparent on the record. *Id.* If the record is not sufficient to support a defendant's ineffective assistance of counsel claim, then defendant has effectively waived the issue. *Id.*

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[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

To establish a constitutional claim for ineffective assistance of counsel, a defendant must demonstrate that "counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney guaranteed by the Sixth Amendment." *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 30 (1994). The deficiency must be prejudicial to defendant. *Id*. To demonstrate prejudice, a defendant must show a reasonable probability that, but for counsel's deficiency, the result of the proceeding would have been different. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996), quoting *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, *supra* at 694. Furthermore, the defendant must overcome a strong presumption that the challenged action is sound trial strategy. *Daniel*, *supra* at 58.

Defendant first alleges that trial counsel's performance was deficient because counsel repeatedly questioned the victims about whether defendant asked for money during the assault. Defendant claims this line of questioning was an attempt to elicit testimony beneficial to the prosecution. Decisions regarding what evidence to present are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). We think it apparent that defense counsel's line of questioning was intended to suggest that defendant lacked the intent to rob the victim. Although repeatedly asked, the witnesses refused to admit that defendant asked for money while holding the victim. By highlighting this fact, the testimony could imply that the assault was unrelated to the request for money. That a strategy does not work does not render its use ineffective assistance of counsel. *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Defendant next alleges that, in lieu of an opening statement, trial counsel made a "separate voir dire," which effectively repudiated defendant's proposed testimony. Trial counsel stated for the record that he advised defendant that defendant was not obligated to prove anything, that the prosecutor was obligated to prove his guilt beyond a reasonable doubt, that defendant could remain silent or take the stand and testify, and that he had advised defendant not to testify. Trial counsel's statement for the record that he had advised defendant of his constitutional rights cannot be construed here as a repudiation of defendant's proposed testimony.

Defendant finally claims that trial counsel disavowed defendant's testimony during closing argument by suggesting that defendant was guilty of a lesser charge, thus rejecting defendant's claim of innocence. Counsel does not render ineffective assistance by conceding certain points at trial, including conceding guilt of a lesser offense. Only a complete concession of guilt constitutes ineffective assistance of counsel. *People v Krysztopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988). Where the evidence clearly points to defendant's guilt, it can be better tactically to admit to the guilt and assert a defense or admit to guilt on some charges but maintain innocence on others. *People v Wise*, 134 Mich App 82, 98; 351 NW2d 255 (1984).

Defendant was originally charged with assault with intent to rob while armed. During closing argument, trial counsel pointed to the scant evidence regarding a weapon and opined that, at best, the prosecution had proved assault with intent to rob while unarmed. Trial counsel then proceeded to argue that the evidence tended to show that it was not defendant's intent to commit

a robbery at all, but rather to make a request for money based on an old family friendship. We will not second guess trial counsel's strategy on appeal.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Hilda R. Gage
/s/ Brian K. Zahra